for being impleaded as a party in this writ petition. This application was allowed by the Bench,—*vide* its order dated 24th August, 1998. The Bank is also before us. The prayer made in the application has been reiterated by the counsel for the Bank during the hearing of this case. It, thus, appears that the petitioner as well as the State Bank of India are jointly requesting the court to transfer the investigation of the case to an impartial agency. Resultantly, we find no conflict between the two proceedings. Thus, the pendency of Criminal Misc. No. 10543-M of 1998 which had been filed by the Bank does not operate as a bar to the filing of the present writ petition. If at all, it has only afforded an opportunity to respondent Nos. 6 to 8 to putforth their view point. This is so because, learned counsel for the parties have stated before us, that M/s Kewal Krishan, Sanjiv Kumar and Narender Chander who are respondent Nos. 6 to 8 in the present petition are no longer parties in the petition filed by the State Bank of India.

(14) It is true that the Central Bureau of Investigation may by now be overburdened. However, the present is a case which will be a useful addition to its burden.

(15) Resultantly, we allow the petition and direct that the investigation of the case registered,—*vide* FIR No. 129, dated 10th March, 1998 at Police Station, City Kaithal under Section 420/120B IPC shall be transferred to the Central Bureau of Investigation. In the circumstances, there will be no order as to costs.

J.S.T.

Before V. S. Aggarwal, J

MAHARISHI DAYANAND EDUCATION SOCIETY & OTHERS,—*Petitioners*

versus

SATYENDRA BHADANA AND OTHERS,—*Respondents*

C. R. No. 2849 of 1998

The 17th November, 1998

Code of Civil Procedure, 1908—S. 92, Order 1 Rl. 8—Scope of Order 1 Rl. 8—Permission of the Court to file representative suit—No permission obtained or granted at the initial stage—

Maintainability of suit—Such permission granted during the pendency of the suit—Whether valid.

(Thakardawara, Patiala and others v. Nagar Singh and others, 1998(3) P.L.R. 81 and Prithipal Singh v. Magh Singh and others, AIR 1982 P & H, 137, distinguished)

Held that the provisions of order 1 rule 8 of the Code of Civil Procedure are mandatory.

Further held that on close scrutiny, a clear distinction is drawn between the provisions under section 92 and order 1 rule 8 of the Code. Under Section 92 of the Code, the Legislature uses the words "and having obtained the leave of the Court may institute a suit". This is clear that it is a *sine qua non* before institution of the suit. Without such a permission, the suit cannot proceed. While under Order 1 rule 8 of the Code, the Legislature has used the expression "with the permission of the Court". Though permission of the Court must be obtained before filing of the suit, yet it can be deferred and can be granted subsequently during the pendency of the suit. There is plain difference in the language. Under Section 92 of the Code, necessary permission of the Court is must before any step is taken. That will not be so in the suit filed under Order 1 Rule 8 of the Code.

(Para 18)

A.P.S. Ahluwalia, Advocate, J. S. Bhatti, Advocate and Hemant Malhotra, Advocate, *for the Petitioner.*

R. S. Sihota, Advocate, *for the Respondent.*

JUDGMENT

V. S. Aggarwal, J

(1) The present revision petition has been filed by Maharishi Dayanand Education Society, Faridabad, and others hereinafter described as "the petitioners". It is directed against the order of the learned trial Court and that of the learned Additional District Judge, Faridabad, dated 11th February, 1994 and 5th June, 1998 respectively. The learned trial Court had allowed the application filed by the respondents under Order 39 Rules 1 and 2 of the Code of Civil Procedure. The said order was upheld by the learned Additional District Judge, Faridabad.

(2) The relevant facts are that respondent Satyendra Bhadana and others had filed a civil suit for declaration and permanent injunction against the petitioners. It was alleged that the petitioner-Society is a registered educational society which is engaged in propagating the teachings of Maharishi Dayanand and for promoting the cause of education. It is running various educational institutions, schools and colleges in the area of Faridabad. The Governing Body of the petitioner-society consists of 15 members. Four are called the office bearers and others are members (non-official members). The election was to be held every three years and the members of the general body only are eligible to elect members of the Governing Body. The term of the President and the Governing Body had expired and a public notice was issued notifying the election programme for electing only four mandatory seats, namely, President, Vice-President, Secretary and Treasurer. The plaintiff-respondents claimed that they are *bona fide* members of the general body of petitioner No. 1. They had paid their subscription upto date. The members of the Governing Body were stated to be mismanaging the affairs of the petitioner-society and their activities were prejudicial and detrimental to the interest of justice. They were indulging in nefarious activities and causing financial loss to the society. They wanted to exercise control over the management of affairs of petitioner-society and with that in view they fabricated the membership record of the general body and added the names of about seventy persons in the list of members. Those 70 members were not the duly enrolled members of the petitioner-society nor they have paid their subscription. If false members were allowed to cast their votes, then the result of the election is likely to be materially affected. The election programme so notified, therefore, was stated to be illegal on the grounds that the public notice issued by the Secretary of the society is highly illegal because there is no post of the Secretary of the society; the election programme is tainted with illegality because it did not disclose the time, date and manner of election of the other eleven non-official members of the Governing Body, the name of the Election Officer/Returning Officer has not been mentioned and above all, false names have been included only to affect the result of the election. Respondents Nos. 2 to 4 have been shown as founder members but, in fact, they are not so. During the pendency of the suit, the respondent-plaintiffs prayed for *ad interim* injunction to restrain the defendant-petitioners from holding the election.

(3) In the written statement that was filed, civil suit as well

as application seeking *ad interim* injunction was contested. It was asserted that respondent-plaintiffs have no *locus standi* to file the suit because they are not members of the Governing Body. Plaintiffs No. 2 to 5 were not even stated to be members of the society. According to the petitioners, Shri K. L. Mehta was promoting the cause of education with the help of Arya Samaj who could see the need of education for masses in the District of Faridabad. He died on 28th January, 1993. The election notice to elect members of the Governing Body was duly published in two local newspapers. Notice for election to be held on 21st February, 1993 was sent to all the bona fide life members on 1st February, 1993 and 2nd February, 1993. Only respondent No. 1 (plaintiff No. 1) was admitted to be the *bona fide* life member of the society. It was denied that the petitioners have mismanaged the affairs of the society or that there was an attempt to have permanent control over the Governing Body. It was denied that the plaintiffs are entitled to get the election programme declared null and void. As per petitioners, 50 persons had raised objections and their membership was rejected because their assertions were found to be false. Two receipt books were issued. They were missing and First Information Report was lodged. The receipt books have been misused for creating false membership. Public notice regarding misplacement of receipt books had been issued. On the basis of it, certain false members have been included.

(4) Learned trial Court on appraisal of the material on record had concluded that there was a *prima facie* case that was drawn and that the balance of convenience was in favour of the plaintiff-respondents. *Ad interim* injunction was granted. Aggrieved by the same, an appeal was filed which was dismissed. The First Appellate Court held that non-compliance of Order 1 Rule 8 of the Code of Civil Procedure (for short "the Code") is a procedural error and is not going to materially affect the merits of the case. Hence, the present revision petition.

(5) Learned counsel for the petitioners during the course of arguments highlighted the fact that civil suit has been filed under Order 1 Rule 8 of the Code. No such permission of the Court had been obtained while the suit is continuing and *ad interim* injunction had been granted. According to him, in the absence of such a permission, the suit as such was not maintainable and must be dismissed. In support of his argument, reliance was placed on the

Division Bench decision of this Court in the case of *Jai Narain and others* v. *Chandgi Ram and others* (1). This Court considered the scope of Order 1 Rule 8 of the Code and concluded that conditions for applicability are :

(i) the parties must be numerous ;

(ii) the parties must have same interest in the suit ;

(iii) Court's permission must be obtained ; and

(iv) notice must be given to the parties whom it proposes to represent in the suit.

(6) It was further held that obtaining the judicial permission is necessary. In paragraph 4 of the judgment, the Division Bench concluded as under :—

> "The obtaining of judicial permission is an essential condition for binding persons other than those actually parties to the suit and their privies. If this essential condition is not fulfilled, the suit cannot be said to be a representative one. The proper course is to obtain permission before the suit is instituted."

(7) The learned Single Judge of the Madras High Court in the case of *The Assistant Commissioner, Hindu Religious and Charitable Endowment, Salem and others* v. *Nattamai K. S. Ellappa Mudaliar and others* (2) was also considering the scope of Order 1 Rule 8 of the Code. It was held that permission under Order 1 Rule 8 of the Code must be obtained before hand. In paragraph 9 of the judgment, the Court held as under :—

> ". . . It is only in accordance with the said salutary principle, the procedure in Order 1 Rule 8 Civil P.C. has been prescribed. The object of the rule is to avoid unnecessary tedium and expense of litigation and to give a binding force to the decision which may be ultimately passed in the suit. A person cannot seek to advance the claims of a group of persons or community without adopting the procedure, under Order 1 Rule 8 Civil P.C., if the relief is prayed for only on the basis of the rights of the

(1) 1977 P.L.J. 527
(2) A.I.R. 1987 Madras 187

community as such. It is no doubt true that Order 1 Rule 8, Civil P.C. pre-supposes that each one of the numerous persons by himself has a right of suit. If a person himself has no such right to sue, he cannot be permitted to sue on behalf of the others who have a right. But, the distinction has to be maintained between cases where the individual puts forward a right which he has acquired as a member of a community and cases where the right of the community is put forward in the suit. If it is the former, the individual is not debarred from maintaining the suit in his own right in respect of a wrong done to him even though the act complained of may also be injurious to some other persons having the same right. If it is the latter, the procedure under Order 1, Rule 8, Civil P.C. has to be followed and without doing so, no relief could be granted to the individual concerned."

(8) Learned counsel for the petitioners further relied upon the decision of the Supreme Court in the case of *R. Venugopala Naidu and others* v. *Venkatarayulu Naidu Charities and others* (3). Herein, besides dealing with section 92 of the Code, the scope of Order 1 Rule 8 of the Code was also considered. It was held that both the suit are in a representative capacity and all persons interested gets bound. In paragraph 10 of the judgment, the Supreme Court held as under :—

". . . According to the learned counsel, Section 92 of the Code brings out a dichotomy in the sense that there are "parties to the suit" and "persons interested in the trust". According to him, persons interested in the trust cannot be considered parties to the suit although the judgment/ decree in the suit is binding on them. He has also argued that a suit under Section 92 of the Civil Procedure Code is different from a suit filed under Order 1 Rule 8 of Civil Procedure Code. We do not agree with the learned counsel. A suit whether under Section 92 of Civil P.C. or under Order 1 Rule 8 of Civil P.C. is by the representatives of large number of persons who have a common interest. The very nature of a representative suit makes all those who have common interest in the suit as parties. We, therefore, conclude that all persons who are interested in Venkatarayulu Naidu Charities

(3) A.I.R. 1990 S.C. 444

which is admittedly a public trust are parties to the original suit and as such can exercise their rights under clauses 13 and 14 of scheme-decree dated 9th September, 1910."

(9) It is abundantly clear from the aforesaid that permission of the Court is necessary before a suit under Order 1 Rule 8 of the Code can proceed. However, the question in the present case that arises is as to what is the effect of the subsequent grant of permission because it was not being disputed that during the pendency of the suit permission has since been granted. It is, indeed, not in controversy that such permission should be obtained.

(10) Learned counsel for the petitioners had drawn the attention of the Court towards the decision of this Court in the case of *Kundan Singh and others* v. *Gurnam Singh and others* (4). The conclusion arrived at by this Court are as under:—

"After hearing the learned counsel for the parties. I do not find any merit in this appeal. Admittedly, the trial Court failed to comply with the provisions of Order 1 Rule 8 C.P.C. The said provision of law is mandatory in nature. In the absence of any notice, the provisions of sub-rule (2) would become redundant and grave injustice may result therefrom in the form of a decree against persons who were never told that a case was pending against them. It was held in Radha Kishan v. Raja Ram (1976) 78 Pun LR 271 that the issue of a notice is not a mere empty formality but a *sine qua* non for the applicability of the rule. Under the circumstances, the lower appellate Court rightly set aside the decree of the trial Court and remanded the case for fresh decision after complying with the provisions of Order 1, Rule 8. . . ."

(11) Similar view was expressed by the Orissa High Court in the case of *Lakhana Nayak and another* v. *Basudev Swamy and others* (4A). It was held that notice to all the persons interested is necessary before permission under Order 1 Rule 8 of the Code can be granted. In paragraph 6 of the judgment, the findings recorded by the Court are as under :—

(4) A.I.R. 1986 P & H. 51
(4A) A.I.R. 1991 Orissa 33

"There cannot be any manner of dispute that when a suit is filed invoking the provision of Order 1, Rule 8 of the Code of Civil Procedure, the said provision must be fully complied with. In view of the contention raised by the learned counsel for the appellants, I carefully examined the order-sheet of the lower Court and find sufficient force in the contention of the learned counsel. On examining the order-sheet as well as the records of the case, I find that though by order No. 9, dated 1st October, 1975, the Court had directed for publication of the notice in Weekly Nabina, but there has been no material thereafter either in the order-sheet or in the record to indicate that such notice had in fact been published. Since the notice has not at all been published, question of further finding out whether there has been due compliance of the provision of Order 1, Rule 8, Code of Civil Procedure, cannot be gone into. In the absence of any material that the notice was published as directed by the learned trial Judge, there is no other option than to hold that the provisions contained in Order 1 Rule 8, Code of Civil Procedure have not been complied with and consequently, the subsequent proceedings including disposal of the suit must be held to be bad in law. The judgment of the learned trial Judge is liable to be set aside on this ground alone."

(12) Same view prevailed with this Court in the decision rendered in the case of *Har Kishan and others* v. *Durga and others* (5).

(13) It is abundantly clear from the perusal of these precedents that they basically deal with the question as to whether valid permission under Order 1 Rule 8 of the Code has been granted or not ? That would not be applicable in the facts of the present case. As mentioned above, permission has since been obtained during the pendency of the suit. The scope of the present revision is not to go into the validity of that permission. If the petitioners have any grievance, they can challenge the validity of the same which may be considered in accordance with law.

(14) Confronted with this position, learned counsel stress, as already mentioned above, was that the permission so granted

(5) 1996 (1) P.L.R. 787

during the pendency of the suit will not validate the still born suit. He referred to the decision of this Court in the case of *Prithipal Singh* v. *Magh Singh and others* (6), wherein in paragraph 15 of the judgment while considering Section 92 of the Code held as under :—

> "There is no dispute with the proposition that the grant of leave is the condition precedent to the filing of the suit and that the provisions of Section 92 of the Code are mandatory in nature in that respect and a defendant cannot waive that right and thus confer jurisdiction on a Court. The trial Court in the present case was certainly not right in observing that the granting of leave is a mere irregularity which can be cured or that the defendant having filed the written statement should be taken to have waived his right to question the filing of the suit."

(15) More recently in the case of *Thakardawara, Patiala and others* v. *Nagar Singh and others* (7), while dealing with Section 92 of the Code a similar argument prevailed and found favour. It was held that valid permission is a precondition and one cannot inject life into a still born suit. The findings arrived at are as under :—

> "One cannot inject life into still born suit. Once permission had to be obtained before filing the suit, in that event there was no escape but to conclude that once permission has been granted, it would only permit the respondents to file a fresh suit, if need be on basis of the said permission rather than continuing with the old one. It is true that Orissa High Court in the case of *Kintali China Jagandham and others* (supra) had held that once permission has been granted, in that event, even if it is granted during pendency of the suit, the suit be taken to have been filed from the date the permission is granted. It was held :—
>
> > "I, therefore, hold that leave under Section 92 is a mandatory condition precedent. The proper procedure is for the plaintiff-petitioners to file an

(6) A.I.R. 1982 P&H 137
(7) 1998 (3) P.L.R. 81

application for leave and to append thereto a copy of the draft plaint of the suit proposed to be filed by them in order to enable the court to grant leave, since leave is to be strictly construed. The suit instituted should be substantially in accordance with the leave granted. Since grant of leave is condition precedent, there cannot be validly instituted suit prior to the grant of leave. Generally, a plaint seeking relief or reliefs coming within the purview of Section 92 without grant of leave should be refused. But, where a suit has been registered or interim orders have been passed prior to the grant of leave, the same shall be held to be incompetent, invalid and honest. Where leave, is granted in a pending suit, the plaintiff may either ask for return of the plaint for representation of the same in conformity with the leave granted, or may ask the court to treat the plaint as instituted on and from the date leave is granted, if the plaint is substantially in conformity with the leave."

"With respect one finds difficult to subscribe to the view that once permission is granted during pendency of the suit, then suit be taken to have registered from the date of the permission. But is appears that what prompted the Orissa High Court in taking such a view was that interim order was passed prior to grant to leave. The Court was very much concerned that the same would become incompetent and invalid. It is not so, in the present case. The permission had been obtained during pendency of the suit and on the basis of the said permission, the respondents if so advised can only bring a fresh suit. They cannot continue with the suit which was not maintainable without permission. The provisions of sub-sections (1) and (2) of Section 92 C.P.C. are

mandatory."

(16) Can one bring into force the said logic of Section 92 of the Code in Order 1 Rule 8 of the Code ? The answer has to be in the negative. To appreciate this particular contention, reference can be made to the relevant portion of sub-section (1) to Section 92 of the Code which reads as under :—

> "92. **Public charities** :—(1) in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration or any such trust, the Advocate—General, or two or more persons having an interest in the trust and having obtained the [leave of the Court] may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—
>
> (a) to (h) xx xx xx

(17) Order 1 Rule 8 of the Code with which we are presently dealing with can also be referred to. It reads as under :—

> "8. **One person may sue or defend on behalf of all in same interest**.—(1) Where there are numerous persons having the same interest in one suit—
>
> (a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suits, on behalf of, or for the benefit of, all persons so interested :
>
> (b) the Court may direct that one or more of such persons

may sue or be sued or may defend the suit, on behalf of, or for the benefit of, all persons so interested."

(18) On close scrutiny, a clear distinction is drawn between the two. Under section 92 of the Code, the Legislature uses the words "and having obtained the leave of the Court may institute a suit". This is clear that it is a *sine qua non* before institution of the suit. Without such a permission, the suit cannot proceed. While under Order 1 rule 8 of the Code, the Legislature has used the expression "with the permission of the Court". Though permission of the Court must be obtained before filing of the suit, yet it can be deferred and can be granted subsequently during the pendency of the suit, as seen hereinafter. There is plain difference in the language. Under section 92 of the Code, necessary permission of the Court is a must before any step is taken. That will not be so in the suit filed under Order 1 Rule 8 of the Code. Reference in this connection can be made to the decision of the Madhya Pradesh High Court in the case of *Shantilal Bardichand Mahajan* v. *Champalal Radhaji and others* (8). Herein, a suit was filed and specifically it was mentioned in the plaint that it was on behalf of other creditors also. Notice under Order 1 Rule 8 of the Code was not issued. Every body concerned including the Court for got about it. For the first time this came to light in appeal. It was held that such a permission could be granted in appeal. In paragraph 10 of the judgment, Division Bench of Madhya Pradesh High Court held as under :—

". . . . In the present case, the plaint is clear enough and the plaintiff's position is in fact stronger. In the case reported in *Mukaremda* v. *Chhagan* AIR 1956 Bom 491, the plaint was filed, as in the instant case, as one in the representative capacity. There was no formal permission recorded in the order but some notices were issued. So the court held that the absence of a formal order giving permission was really immaterial; but in the earlier Bombay case reported in *Hubli Panjarapole* v.

(8) A.I.R. 1962 M.P. 363

Saraswatavva Bayappa, AIR 1953 Bom 334, there was a real omission to issue notices and it was held that during the pendency of the suit itself, permission could be sought and notices issued. Thus, authority is ample for the view that the omission can be remedied even at the appellate stage, if the nature of the suit is not changed."

(19) Kerala High Court in the case of *Kuthukutty Kunhall's son kunhalavi Musaliar and others* v. *Pakkath Enu's son Abdulla and others* (9), dealt with a similar situation and concluded in paragraph 9 of the judgment as under :—

"...The Court ordered the publication of the notice in a local paper in March, 1956 i.e. soon after the suit was instituted and notice was published in the local paper. It is seen that on the date when the judgment was pronounced there was an order passed by the court permitting the plaintiffs to sue in a representative capacity and allowing the defendants to defend the suit in representative capacity. On the basis of those facts the appellants argued that the provisions or Order 1, Rule 8 have not been complied with. Their argument was that the order for permission was invalid as it was passed subsequent to the publication of the notice in the paper."

(20) Himachal Pradesh High Court in the case of *Smt. Ram Piari* v. *Shri Amar Singh and others* (10), was dealing with somewhat a similar situation. An appliction under Order 1 Rule 8 of the Code was filed with the plaint. It was held that it is the duty of the Court to dispose it of. But leave can be granted at a later stage. The precise findings recorded are as under :—

"... Upon the facts of this case, it seems that it is premature to say that this condition is satisfied. The provision

(9) A.I.R. 1965 Kerala 200
(10) A.I.R. 1978 H.P. 22

contemplates that the suit must fail, and I am of the opinion that so long as the application under Order 1, Rule 8 is pending, that cannot be said of the suit. The application was filed with the plaint, and it is the duty of the Court to dispose it of. The omission to do so can be remedied at any stage during the trial of the suit. Ordinarily, leave under Order 1 Rule 8 should be sought and its grant considered when the suit is instituted. But the omission to obtain leave at the commencement of the suit cannot serve as a reason for dismissing the suit. No question of jurisdiction is involved. Leave can be granted at any stage after the suit has been filed . . . ."

(21) More recently, Madras High Court in the case of *N. Anandan* v. *Ayyanna Gounder and others* (11), dealing with a similar situation took up the same view and concluded as under :—

"..The language used in Order 1 Rule 8(1)(a) is as follows :—

"One or more of such persons may, with the permission of the Court, sue. . . . . ." It must also be noted that the permission spoken to in Order 1 Rule 8, C.P.C. is not and has also not been held to be condition precedent as in the case of leave under Section 92, C.P.C. Permission under Order 1, Rule 8, C.P.C., may be granted even after the institution of the suit and even at the appellate stage by allowing an amendment, if such amendment does not materially change the nature of the suit (AIR 1947 Mad 205, *Mooka Pillai* v. *Valavanda Pillai and AIR 1943 Mad 161,* Muthukaruppa Ethandar v. Appavoo Nadar)".

(22) As has been noticed above, from the plain language used in Order 1 Rule 8 and Section 92 of the Code is clear that under

(11) A.I.R. 1994 Madras 43

Order 1 Rule 8 of the Code, permission of the Court can be obtained subsequently.

(23) There is an important reason in this regard in the peculiar facts of this case. The application under Order 1 Rule 8 of the Code had been filed along with the plaint. The learned trial Court did not grant any permission at that time. Indeed, nobody is to suffer or take benefit of the fault of the Court. As noted above, such permission should be considered and effective steps taken. Once such an application has been appended along with the suit, then the plaintiff cannot be made to suffer in this regard. Permission granted now will not invalidate the suit. Therefore, it must be held that the permission so granted during the pendency of the suit would save dismissal of the suit.

(24) Regarding the merits of the matter, both the learned trial Court and the learned Additional District Judge had found that there is no *prima facie* case in favour of the plaintiffs. It has been noted that Mrs. Vimal Mehta and Shri B. L. Bhatia have been shown as founder members. They were not *prima facie* shown to be so. It was, in fact, admitted that defendant No. 4 Shri B. L. Bhatia has inadvertently been included as founder member. Furthermore, it has been noted from the receipt books that members mentioned in the list have paid their subscription though they were not included in the final list of members, while certain other persons have invalidly been included as members. Further discussion in this regard would only embarrass either party. Suffice to say, *prima facie* case was drawn in favour of the plaintiff-respondents. Balance of convenience would also be in favour of the plaintiff-respondents if elections were held as per plan of the petitioners. It is the plaintiff-respondents who would suffer irreparable loss. There is no ground thus to interfere in the impugned order.

(25) For these reasons, the revision petition must fail and is dismissed. However, it is made clear that nothing said herein express the opinion on the merits of the matter. The petitioners would be at

liberty to challenge the permission granted under Order 1 Rule 8 of the Code and no opinion in this regard is expressed. The trial Court is directed to expedite and complete the trial in terms of the order already passed.

S.C.K.

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